

Rec'd 1430hr, 29 Sep 11 TL



A&B PROPERTIES, INC.

A SUBSIDIARY OF ALEXANDER & BALDWIN, INC.

September 27, 2011

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Kahului, Hawaii 96732-1608  
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Tel (808) 877-5523  
Fax (808) 871-7497

Mr. Thom Lichte  
U.S. Army Corp of Engineers  
ATTEN: CEPOD-PDC  
Building 525  
Fort Shafter, Hawaii 96858-5440

Subject: Provisional Letter of Permission  
File No. POH-2010-00079  
Request for Appeal  
Maui Industrial Park Offsite Drainage System

Dear Mr. Lichte:

We have reviewed the subject "Provisional" Letter of Permission, dated August 1, 2011 and we would like to appeal the requirement for permitting under Section 10 of the Rivers and Harbors Act Section 1899. A signed copy of the appeal form is enclosed.

We are appealing the permitting requirement for the following reasons:

1. We believe the jurisdictional determination upon which the permit is based to be incorrect (i.e., no permit should be required for the proposed work on the storm drainage system).
2. The letter of permission only covers the periodic removal of sand from the outlet end of the culverts.

Attached for review is a discussion regarding the applicability of Section 10 for permitting the maintenance and operation of the subject drainage system. We would also like to clarify that permitting is not required for slip-lining of damaged culverts at Amala Place.

Your review of this appeal will be greatly appreciated. Please contact me at (808) 872-4317, or at [hkawahara@abprop.com](mailto:hkawahara@abprop.com), should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. Kawahara', written over a horizontal line.

Hideo Kawahara, P.E.

for A&B PROPERTIES, INC.

HK  
Enclosures

cc: Robert D. Deroche  
Properties, Honolulu

## NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Grant Y.M. Chun,  
A&B Properties, Inc.

File Number:  
POH-2010-00079

Date:  
August 1, 2011

Attached is:

See Section below

	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
XX	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
	PERMIT DENIAL	C
	APPROVED JURISDICTIONAL DETERMINATION	D
	PRELIMINARY JURISDICTIONAL DETERMINATION	E

**SECTION I -** The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/or> Corps regulations at 33 CFR Part 331.

**A: INITIAL PROFFERED PERMIT:** You may accept or object to the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

**B: PROFFERED PERMIT:** You may accept or appeal the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**C: PERMIT DENIAL:** You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**D: APPROVED JURISDICTIONAL DETERMINATION:** You may accept or appeal the approved JD or provide new information.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**E: PRELIMINARY JURISDICTIONAL DETERMINATION:** You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

**SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT**

**REASONS FOR APPEAL OR OBJECTIONS:** (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

**ADDITIONAL INFORMATION:** The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

**POINT OF CONTACT FOR QUESTIONS OR INFORMATION:**

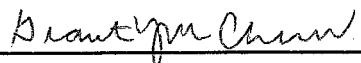
If you have questions regarding this decision and/or the appeal process you may contact:

Robert D. Deroche  
U.S. Army Corps of Engineers  
Honolulu District, Attn: CEPOH-EC-R  
Building 230  
Fort Shafter, Hawaii 96858-5440

If you only have questions regarding the appeal process you may also contact:

Thom Lichte  
U.S. Army Corps of Engineers, Pacific Ocean Division  
ATTN: CEPOD-PDC  
Building 525  
Fort Shafter, HI 96858-5440

**RIGHT OF ENTRY:** Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

  
\_\_\_\_\_  
Signature of appellant or agent.

Date:

9/27/11

Telephone number:

(808) 877-5523

Mail to:

Thom Lichte  
U.S. Army Corps of Engineers,  
ATTN: CEPOD-PDC  
Building 525  
Fort Shafter, HI 96858-5440

**Applicability of Permitting Requirements Under  
Section 10 of the Rivers and Harbors Act Section of 1899  
to Kahului Storm Drain Channel**

The discussion below addresses the applicability of permitting requirements under Section 10 of the Rivers and Harbors Act of 1899 to maintenance and operation of the Kahului storm drain channel. Specifically, the discussion relates to proposed slip lining of culverts in the storm drain channel passing under Amala Place that are in danger of collapse, and to periodic removal of sand from the storm drain outlet as needed to allow outflow during storm events. The U.S. Army Corps of Engineers has issued a provisional letter of permission (dated August 1, 2011) stating that the sand removal “involves work in or affecting the course, condition, location, or capacity of navigable waters of the United States” and therefore requires authorization under Section 10 of the Rivers and Harbors Act. The letter of permission does not address the slip lining project, but an August 3 email from the Corps appears to indicate that the slip lining project also requires authorization under Section 10.

**Purpose of Rivers and Harbors Act, Section 10**

The purpose of this provision is to maintain the navigable capacity of waters of the United States by requiring a permit from the Corps of Engineers for construction within a navigable water of the United States, or for any excavation, fill, or other alteration that would modify the course, location, condition, or capacity of a navigable water of the United States.

**Activities Requiring Permits**

Permits are required under Section 10 for structures and/or work in or affecting navigable waters of the United States, except as otherwise provided. Structures or work are “in” navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to permitting if these structures or work “affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity”. See 33 CFR Section 322.3.

**Limits of “Navigable Waters of the United States”**

For the purposes of the Rivers and Harbors Act, “navigable waters of the United States”, also referred to as “navigable in fact” waters, are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce (33 CFR Section 329.4). Factors which must be examined when making a determination whether a waterbody is a navigable water of the United States include past, present, or potential presence of interstate or foreign commerce; physical capabilities for use by commerce; and defined geographic limits of the waterbody.

Geographic and jurisdictional limitations of navigable rivers and lakes are based on the ordinary high water mark for non-tidal water bodies, or the upper limits of navigability. For ocean and coastal waters, shoreward geographic and jurisdictional limitations are based on the plane of the mean high water. Mean high water is established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years (less precise methods, such as observation of the “apparent shoreline”, may be used when only an estimate is needed of

the line reached by the mean high water). For bays and estuaries, jurisdiction extends to the entire area of the waterbody subject to tidal action. See 33 CFR Sections 329.11 and 329.12.

### **Evaluation of Kahului Storm Drain**

The discussion below addresses whether the Kahului storm drain system meets the criteria for jurisdiction under Section 10 of the Rivers and Harbors Act of 1899.

#### **1. Is the storm drain used, has it been used in the past, or may it be susceptible for use to transport interstate or foreign commerce?**

*The water body is a storm drainage system. It connects, via artificial channels and culverts, developed areas of Kahului to the Pacific Ocean in order to provide an outlet for stormwater drainage. The system does not connect any other waterbody to the Pacific Ocean. The system is not used, has not been used in the past, nor is it susceptible for use to transport interstate or foreign commerce. It is therefore not a "navigable in fact" waterway.*

#### **2. Is the storm drain subject to the ebb and flow of the tides?**

*The storm drain system is not subject to the ebb and flow of the tides. The outlet of the system, where it is connected to the Pacific Ocean, appears to be located above the plane of the mean high water, based on visual observations of the normal reach of the tides. The reach of mean high tide does not extend into the storm drain outlet. Water from the Pacific Ocean may occasionally reach the storm drain outlet during large storm events when the water level exceeds the mean high water mark; the outlet culverts of the storm drain system are therefore normally kept blocked in order to prevent sand from washing into the culverts during such events.*

Based on the foregoing, it does not appear that any work on the Kahului storm drain system, including at the outlet culverts, would occur within the limits of "navigable waters of the United States" as defined under implementing regulations of the Rivers and Harbors Act. Removal of sand during unblocking of the outlet culverts occurs immediately adjacent to the culverts themselves, which appear to be located above the mean high water line. Slip lining of the culverts passing under Amala Place would occur in an area that is neither navigable in fact nor subject to the ebb and flow of the tide.

#### **3. Would work on the Kahului storm drain system affect the course, location, or condition of a navigable waterbody in such a manner as to impact on its navigable capacity?"**

*As noted above, the Kahului storm drain is not itself a navigable water of the United States. Thus, work in the storm drain system would have to affect the course, location, or condition of some other "navigable in fact" water (specifically, the Pacific Ocean) "in such a manner as to impact its navigable capacity" in order for the work to require a permit under Section 10 of the Rivers and Harbors Act. Given the fact that the storm drain system has no direct connection to the Pacific Ocean except during stormwater flows and is kept isolated from the Pacific Ocean by blocking of the discharge culverts except when stormwater flows are anticipated, and given the nature and limited scope of the work planned, it does not appear that the slip lining work could be expected to impact the navigable capacity of the Pacific Ocean in the vicinity of the storm*

*drain outlet. Similarly, the periodic removal of small amounts of sand from an area that is above the mean high water line would not appear likely to impact the navigable capacity of the Pacific Ocean in the vicinity of the outfall.*

### **Conclusion**

Previously, it has been determined that portions of the Kahului storm drain system may be subject to jurisdiction under Section 404 of the Clean Water Act, but that proposed work in the storm drain system is allowed under certain exemptions from Section 404 permitting requirements. Jurisdiction under Section 10 of the Rivers and Harbors Act applies more narrowly than jurisdiction under Section 404 of the Clean Water Act - waters regulated under the Clean Water Act are not necessarily regulated under the Rivers and Harbors Act. For example, the Clean Water Act regulates waters of the United States as well as their tributaries and even adjacent wetlands. Moreover, Clean Water Act jurisdiction extends to the high tide line or in some cases even higher. Implementing regulations under the Rivers and Harbors Act include much more specific jurisdictional limitations.

With respect to the Kahului storm drain, the Corps of Engineers has stated that “the makai ponds and the channel itself have been determined to be within the influence of the Pacific Ocean and, as such, (are) considered an extension of the Pacific Ocean”, and that the work in the drainage channel therefore requires a permit under Section 10 of the Rivers and Harbors Act. It is not clear whether the “influence of the Pacific Ocean” is meant to refer to the ebb and flow of the tides; however, as noted previously, the storm drain outlet appears to be located above the plane of the mean high water and therefore the reach of mean high tide does not extend into the storm drain system. The fact that water levels *in excess* of mean high water (e.g., large waves associated with storms) *could* reach the makai ponds and the channel were it not for man-made structures blocking the outlet culverts is irrelevant given that the jurisdictional boundary is clearly established by mean high water, not by the highest reach of the tide.

Based on the foregoing, it does not appear that the proposed work on the Kahului storm drain system should require a permit under Section 10 of the Rivers and Harbors Act.

It is recommended that the Corps of Engineers conduct a site visit and review the relevant tidal datum to confirm whether any part of the Kahului storm drain system is subject to the ebb and flow of the tide. Once this review has been completed, A&B Properties believe that the Corps will concur that the proposed work would not occur within the limits of “navigable waters of the United States”, nor would it impact the navigable capacity of the Pacific Ocean, and therefore *does not* require a permit under Section 10 of the Rivers and Harbors Act.